

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
)	
vs)	Docket No. 05-0171
)	
)	
CIMCO Communications, Inc.; Forte)	
Communications, Inc.; McLeodUSA)	
Telecommunications Services, Inc.)	
)	
Complaint Pursuant to Section 10-108)	
of the Illinois Public Utilities Act)	
and 83 Ill. Admin. Code 200.170)	

APPLICATION FOR REHEARING OF FORTE COMMUNICATIONS, INC.

Stephen J. Moore
Thomas H. Rowland
Kevin D. Rhoda
Rowland & Moore LLP
200 West Superior Street
Suite 400
Chicago, Illinois 60610

Dated: March 27, 2006

TABLE OF CONTENTS

Summary of Position.....	1
I. The Order Incorrectly Held that AT&T's Written Notice of Termination Pursuant to Section 5.2 of the Parties' Interconnection Agreement was Ineffective.....	3
II. The Order Incorrectly Concluded that the Terms of the Parties' Expired Agreement Allow AT&T to Unilaterally Apply the 02-0864 Rates Retroactively.....	5
III. The Order Improperly Held that the Impact of the Appeal of Docket 02-0864 Should Not be Addressed in the Amendment.....	9
Conclusion.....	10

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
)	
vs)	Docket No. 05-0171
)	
)	
CIMCO Communications, Inc.; Forte)	
Communications, Inc.; McLeodUSA)	
Telecommunications Services, Inc.)	
)	
Complaint Pursuant to Section 10-108)	
of the Illinois Public Utilities Act)	
and 83 Ill. Admin. Code 200.170)	

**APPLICATION FOR REHEARING
OF FORTE COMMUNICATIONS, INC.**

Pursuant to Section 10-113 of the Illinois Public Utilities Act, 200 ILCS 5/10-113, and 200.880 of the rules of the Illinois Commerce Commission, 83 Ill. Adm. Code § 200.880, Forte Communications, Inc. (“Forte”) by and through its attorneys, respectfully submits its Application for Rehearing of the Commission’s Order in Docket No. 05-017, issued on February 23, 2006 and served on February 24, 2006. For the reasons discussed below, Forte requests that the Commission grant this application for rehearing and amend its Order consistent with the recommendations contained herein.

Summary of Position

The Commission committed multiple errors in its Order which granted in part AT&T Illinois’ (“AT&T’s”) complaint against Forte. First, despite AT&T’s written termination notice, the Order held that the Parties’ interconnection agreement (“ICA”) remained effective after its expiration on June 23, 2004. Second, despite Section 44.1 of

the ICA, stating “No provision of this Agreement shall be deemed amended or modified by either Party unless such an amendment or modification is in writing, dated, and signed by an authorized representative of both Parties. *The rates, terms and conditions contained in the amendment shall become effective upon approval of such amendment by the appropriate Commissions*”¹ the Order incorrectly held that the amended rates would be effective on June 24, 2004.

As described below, the terms and conditions of the parties’ ICA and the steps both parties took under that ICA were clear and unambiguous. AT&T took the appropriate steps under Section 5.2 of the ICA to terminate the agreement on its expiration date. Forte took the appropriate steps to attempt to opt in to a new ICA. As a result of the two carriers’ actions, there was no ICA between the parties when AT&T filed new tariffs subsequent to the Commission’s order in Docket 02-0864.

Even if there had been an existing ICA on that date, AT&T’s filing of new tariffs did not automatically apply to unbundled network elements purchased under rates set forth in the ICA. Pursuant to the ICA, AT&T was required to negotiate new rates and those new rates would be retroactive only if the Commission order establishing new rates said so. The Commission’s order in Docket 02-0864 did not retroactively apply the new rates to CLECs, such as Forte, that were purchasing UNEs pursuant to rates set in their ICAs. Rather, the Commission’s order only addressed the effective rates of CLECs purchasing UNEs under tariff. Thus, the rates AT&T is charging Forte can only be adjusted through a renegotiation of the parties’ ICA and would only be prospective pursuant to Section 44.1 of the ICA.

¹ GT&C at §44.1 (emphasis added).

I. The Order Incorrectly Held that AT&T's Written Notice of Termination Pursuant to Section 5.2 of the Parties' Interconnection Agreement was Ineffective.

The Order erred in its determination that AT&T's notice of termination pursuant to Section 5.2 of the parties' ICA was ineffective. AT&T made its intent clear – in writing and in strict accordance the ICA – that it would terminate the parties' ICA. Pursuant to Section 5.2 of the ICA, AT&T issued that notice 180 days prior to the June 23, 2004 expiration date – on December 23, 2003.² AT&T's statement in Support of the Joint Petition for Approval of the ICA explains the rationale behind the 180-day termination notice:

Upon expiration of the initial term, the Agreement shall automatically be renewed for additional one (1) year periods ("renewal term") unless a Party delivers to the other Party written notice of termination of the Agreement at least one hundred twenty (120) days prior to the expiration of the initial term or a renewal term.³

AT&T's termination notice of December 23, 2003 was given after the parties had signed the agreement. In that letter Tonine Megger, the Lead Negotiator for AT&T, stated:

As you know, the term of our pending interconnection agreement will expire on June 23, 2004. This letter will serve as your official notice, specific to Section 5.2, that SBC Illinois intends to terminate its existing interconnection agreement with Forte.

SBC Illinois is available to immediately commence renegotiations of a new interconnection agreement. To ensure we have sufficient time to schedule negotiations meetings, please notify SBC Illinois within the next thirty (30) days of Forte's intent. Thank you for your prompt attention. I

² The fact that AT&T provided its notice of termination prior to the effective date of the agreement, but after the parties executed the agreement, came into play because Forte opted into the McLeod agreement, which was due to expire a little more than six months after Forte and AT&T executed the ICA. Neither AT&T nor the Commission objected to Forte's opt in. The opt in was approved by the Commission on March 30, 2004 in docket 04-0018.

³ Docket 04-0018. Statement of Eddie Reed of AT&T in Support of the Joint Petition for Approval at 5. The reference to 120 days is mistaken. According to Section 5.2 of the ICA, the correct number is 180 days.

will be your contact for all correspondence concerning this matter and can be reached at the numbers listed above.⁴

AT&T acknowledged in the subject line of its termination letter that the ICA it was terminating was “not yet approved.”⁵ Thus, AT&T showed not only the intent to terminate the ICA on June 23, 2004, but also the knowledge that it was doing so according to the terms of the ICA.⁶

Upon receipt of AT&T’s notice of termination pursuant to Section 5.2 of the ICA, Forte did not take the action required under the ICA to enter into a “successor” agreement and instead, attempted to opt in to another agreement via Section 252(i) of the federal Act.⁷ In spite of AT&T’s clear act to terminate the agreement, effectuated in writing, the Order found that the agreement did not terminate by cobbling together some of the other actions – or inactions – of the parties into what the Order claims is an expression of an intention of both parties to not terminate the agreement, including the fact that Forte did not respond within ten days of AT&T’s Notice of Termination; that Forte’s argument could lead to a so called “absurd result”; and that the parties entered into a “trouble isolation” amendment in November 2004. The ICA had explicit language and deadlines setting forth the procedure for renewal and extension. None of these actions met the requirements of the ICA to continue the parties’ ICA beyond the date it was terminated

⁴ Forte Ex. 5.0

⁵ Id.

⁶ AT&T’s notice of termination letter closely tracks Section 5.2 of the ICA. “Absent the receipt by one Party of written notice from the other Party within 180 calendar days prior to the expiration of the Term to the effect *that such Party does not intend to extend the Term*, this Agreement shall remain in full force and effect on and after the expiration of the Term until terminated by either Party pursuant to Section 5.3 or 5.4.” ICA General Terms and Conditions at §5.2. (emphasis added).

⁷ Forte Initial Brief at 4-5.

by AT&T.⁸ The Commission's finding that AT&T's notice of termination letter was ineffective was therefore erroneous.

II. The Order Incorrectly Concluded that the Terms of the Parties' Expired Agreement Allow AT&T to Unilaterally Apply the 02-0864 Rates Retroactively.

The Order fails to give effect to the plain meaning of contract language. The language within a contract must be "interpreted according to its plain, ordinary, and popular meaning."⁹ The Order improperly applies the contract theory that "where a contract contains general and specific terms, the specific terms control".¹⁰ The contract interpretation principle relied upon by the Order is not used to entirely negate one contract provision. Rather, one must attempt to read all contract provisions in a manner that allows them to all be valid. The court must presume that "contracting parties intended all portions of their contract to carry meaning and no portion was meant to be

⁸ In footnotes 1 and 2 of AT&T's Response to Forte's March 15, 2006 Motion for Partial Stay, AT&T makes two disingenuous arguments. With respect to fn 1, AT&T questions the Motion for Partial Stay because the parties recently filed an amendment pursuant to the 14-day requirement of the 05-0171 Order. However, AT&T fails to mention the fact that AT&T and Forte negotiated changes to the amendment in order to preserve Forte's rights on rehearing and/or appeal. With respect to fn 2, AT&T argues that by signing the 05-0442 TRO/TRRO amendment in docket 06-0061 Forte acknowledged that it has an effective ICA with AT&T. That argument is clearly wrong, as Forte stated in a letter accompanying the amendment, "I have enclosed a signed copy of the docket 05-0442 TRO/TRRO Amendment with the understanding that this Amendment will be part of the new interconnection agreement that Forte is currently in the process of opting in to. Please be advised that Forte does not currently have an effective ICA with SBC, a position Forte has taken in docket 0[5]-0171, a docket currently pending before the Illinois Commerce Commission (See Attachment 1 to this Application).

⁹ *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1038 (7th Cir. 1998)(quoting *O'Rourke v. Access Health, Inc.*, 282 Ill. App. 3d 394, 668 N.E.2d 214, 220, 218 Ill. Dec. 51 (Ill. App. Ct. 1996)); See also *International Business Lists, Ltd. V. American Tel. & Tel. Co.*, 878 F. Supp. 102, 106 (N.D. Ill. 1994)(stating that "court's interpreting contracts must give effect to the parties' intent, and that intent is best determined by reference to the plain meaning of the words the parties used.").

¹⁰ Order at 7.

mere surplusage."¹¹ Additionally, "a document should be read to give effect to all its provisions and to render them consistent with each other."¹²

The Order is contrary to contract law and completely invalidates Section 44.1. Such invalidation is not proper and, in fact, is not necessary in order to read all three provisions as being valid and consistent. Although the Order explicitly acknowledged Section 44.1 of the General Terms and Conditions, it holds it to be a "general" term, thereby effectively ignoring the provision entirely. Section 44.1 states:

No provision of this Agreement shall be deemed amended or modified by either Party unless such an amendment or modification is in writing, dated, and signed by an authorized representative of both Parties. The rates, terms and conditions contained in the amendment shall become effective upon approval of such amendment by the appropriate Commissions.

But how can terms be *more* specific than "The **rates** terms and conditions **contained in the amendment shall become effective upon approval** of such amendment **by the appropriate Commissions**"? (emphasis added).

Rather than give effect to GT&C §44.1, which explicitly addresses changes in rates, the Order wrongly concluded (at pages 6-7) that GT&C §2.11.3 and Appendix Pricing §1.6 contains "specific terms" for the implementation of new rates. That conclusion is not only inconsistent with GT&C §44.1, it is also unsupported by GT&C §2.11.3 and Appendix Pricing §1.6. Those sections both state that the Parties "agree to amend" the agreement to "incorporate such new rates, prices and charges, with such

¹¹ *Rush Presbyterian – St. Luke’s Medical Center v. Prudential Insurance Company of America*, 2004 U.S. Dist. LEXIS 5187, *8-9 (N. Dist. IL 2004) (citing *Snelten v. Schmidt Implement Co.*, 269 Ill. App. 3d 988, 647 N.E.2d 1071, 1074, 207 Ill. Dec. 578 (Ill. App. Ct. 1995)).

¹² *Rush Presbyterian*, 2004 U.S. Dist. LEXIS at *9 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995)). See also *Srivastava v. Russell’s Barbecue, Inc.*, 168 Ill. App. 3d 726, 523 N.E.2d 30, 33, 119 Ill. Dec. 562 (Ill. App. Ct. 1998) (stating that a principle of contract construction is that contracts are to be interpreted as a whole, giving meaning and effect to each provision).

rates, prices and charges to be effective as of the date specified in such order or docket (including giving effect to any retroactive application, if so ordered).” The order in Docket 02-0864 did not set the date for rates to be included in ICAs. Rather, the Order correctly noted that rates would be incorporated pursuant to negotiation/intervening law provisions of individual ICAs.¹³ The 02-0864 order merely set the effective date for AT&T’s tariff filing, which would be effective on that date only for carriers taking service under AT&T’s tariff. The Commission did not set the effective date for ICAs. That effective date would, as set forth in GT&C §44.1, be the date of approval of the amendment to the ICA incorporating those new rates.

The Order’s finding that rates are retroactive to the effective date of the tariff is also inconsistent with the history of the Docket 02-0864 Order. In its Brief on Exceptions in Docket 02-0864, AT&T requested that ICA rates would be effective on the same date that AT&T’s tariff rates became effective. Rather than grant AT&T’s request “to require that amendments to ICAs to reflect the approved changes in UNE rates be filed with the Commission within 30 days of the order, with such rates to become effective on the same date that the compliance tariff becomes effective,”¹⁴ the Commission ordered AT&T to file compliance tariffs and held that: “The prices contained in a final interconnection agreement may be lower or higher than those contained in the tariff based on the give and take inherent in the negotiation process.”¹⁵ Thus, the Commission declined to adopt AT&T’s proposal and instead held that AT&T’s

¹³ See 02-0864 Order 293.

¹⁴ SBC Illinois Brief on Exceptions at 80.

¹⁵ Docket 02-0864 Order at 293.

compliance tariffs were to be filed 14 days after the Order, to become effective 7 days after filing.¹⁶

The Commission's Order of rates retroactive to July 24, 2004 was also improper because AT&T did not follow the requirements of Section 2.11.3 of the General Terms and Conditions and Section 1.6 of the Appendix Pricing, which require negotiations and mutual assent between the parties of any amendments to the ICA prior to any amendment becoming effective. Rather, AT&T attempted to unilaterally impose its proposed amendment upon Forte without engaging Forte in negotiations. Having at best mailed the amendment to Forte, AT&T then, without further contact or discussion, notified Forte in November of 2004 that it was entering into its dispute resolution process.¹⁷ Forte immediately responded to AT&T's dispute resolution notice and sent AT&T its proposed changes to the amendment.¹⁸ Instead of negotiating the terms of the agreement, however, AT&T brought the complaint that led to the Commission's Order.

Finally, the Order ignored the fact that Section 2.11.3 of the ICA and Section 1.6 of the Appendix Pricing require negotiations and mutual assent between the parties of any amendments to the ICA prior to any amendment becoming effective. Here, AT&T attempted to unilaterally impose its proposed amendment upon Forte without engaging Forte in negotiations.¹⁹ AT&T provided a ready-to-sign document, which left no room for discussing the terms of the amendment. Without any negotiations, AT&T immediately moved to dispute resolution and then filed this case. Therefore, if the

¹⁶ Id. at 299.

¹⁷ Although AT&T alleged it mailed Forte a notice of an amendment, Forte never received the notice and even if it had, the amendment was a ready-to-sign document, which left no room for discussing the terms of the amendment. Forte Ex. 1.0 at 1-2.

¹⁸ Forte Ex. 1.0 at 2 and Forte Ex. 1.0, Attachment B.

¹⁹ Forte Initial Brief at 12-15.

Commission finds that the parties had a valid ICA, it should find that the amended rates are effective on a prospective basis.

III. The Order Improperly Held that the Impact of the Appeal of Docket 02-0864 Should Not be Addressed in the Amendment.

Forte requested that the parties include a provision in their ICA that addresses the possibility that the Docket 02-0864 rate order would be reversed on appeal. Such language would either establish refund rights in the event that the final nonappealable rates were lower or higher than the ones actually paid by Forte or find that the only lawful rates AT&T could legally charge would be the last ICC authorized TELRIC rates in place prior to June 2004. The Order improperly rejected Forte's proposal, finding that "The effective date of any revision in the rates would be controlled by the court decision and implemented through the terms and conditions of the parties' ICA." Order at 8.

The Order misses the point. If the Court sets a date, of course that date would apply. But what happens when there is no date set by the Court? It is not a sufficient answer to say here that no terms and conditions are necessary to address this issue because the court decision would be "implemented through the terms and conditions of the parties' ICA."

That is what Forte is requesting – terms and conditions that would implement the Court order. This is no longer a theoretical issue, because Judge Castillo of the Northern District of Illinois, Eastern Division, has indeed reversed the Commission order. Further, both AT&T and CLECs have appealed that decision to the Seventh District Circuit Court of Appeals. The parties should have a provision that avoids future litigation over retroactive application of any court decision by including terms and conditions that set forth the parties' rights and responsibilities. The Commission therefore erred by declining to adopt Forte's proposed terms and conditions regarding the 02-0864 appeal.

Conclusion

Wherefore, Forte respectfully requests that the Commission grant rehearing, as described above and in Forte's briefs in this proceeding.

Respectfully submitted this 27th day of March 2006,

FORTE COMMUNICATIONS, INC.

By: _____
Stephen J. Moore
Thomas H. Rowland
Kevin D. Rhoda
Rowland & Moore LLP
Suite 400
200 West Superior Street
Chicago, Illinois 60610

Counsel for Forte Communications, Inc.

CERTIFICATE OF SERVICE

I, Kevin D. Rhoda, do hereby certify that I have, on this 27th day of March 2006, caused to be served upon the following individuals, by e-mail, a copy of the foregoing Application for Rehearing of Forte Communications, Inc. in Docket 05-0171.

Kevin D. Rhoda
Rowland & Moore LLP

Counsel for Forte Communications, Inc.

Docket 05-0171 Service List

Karl B. Anderson
Corporate/Legal
Illinois Bell Telephone Company
225 West Randolph, Floor 25D
Chicago, IL 60606

E-Mail: ka1873@sbc.com

Brandy Bush Brown
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601

E-Mail: bbrown@icc.state.il.us

Matthew L. Harvey
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104

E-Mail: mharvey@icc.state.il.us

Lori Kline
Forte Communications, Inc.
Technologies Management, Inc.
PO Drawer 200
Winter Park, FL 32790-0200

Michael J. Lannon
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601

E-Mail: mlannon@icc.state.il.us

Stephen J. Moore
Thomas H. Rowland
Kevin D. Rhoda
Atty. for CIMCO Communications, Inc.
and Forte Communications, Inc.
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610

E-Mail: steve@telecomreg.com

Sanjo Omoniyi
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.

Springfield, IL 62701

E-Mail: somoniyi@icc.state.il.us

Mary Pat Regan
Vice President - Regulatory
Illinois Bell Telephone Company
555 Cook St., Fl. 1E
Springfield, IL 62721

E-Mail: mr1296@sbc.com

Tom Waterloo
President
Forte Communications, Inc.
1028 Hull Terrace
Evanston, IL 60202

E-Mail: tomw@fortephones.com

James Zolnierrek
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701

E-Mail: jzolnier@icc.state.il.us